



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Nicole Curling dated April 15, 1994, amended August 28, 1998, alleging discrimination in employment on the basis of sex, sexual harassment and sexual solicitation, and by Order dated September 30, 1999, alleging reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Nicole Curling

Complainant

- and -

Alexander Torimiro
The Victoria Tea Company Ltd.
The Torimiro Corporation

Respondents

DECISION ON REMEDY

Adjudicator : Katherine Laird

Date : October 3, 2000

Board File No: BI-0245-99

Decision No : 00-017-R

Board of Inquiry (*Human Rights Code*)
505 University Avenue
2nd Floor, Toronto, On M5G 2P3
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946
TTY: (416) 314-2379 / 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission)	Joanne Rosen, Ena Chadha, Lisa Cirillo
)	<i>Counsel</i>

Nicole Curling,)	Geri Sanson
<i>Complainant</i>)	<i>Counsel</i>

Alexander Torimiro,)	Stacey Reginald Ball
<i>Personal Respondent</i>)	<i>Counsel</i>

The Victoria Tea Company Ltd.)	Stacey Reginald Ball
The Torimiro Corporation,)	<i>Counsel</i>
<i>Corporate Respondents</i>)	

INTRODUCTION

On December 22, 1999, the Board of Inquiry released my decision on the merits of the complaint of Nicole Curling ("Curling") against Alexander Torimiro ("Torimiro"), The Victoria Tea Company ("Victoria Tea") and The Torimiro Corporation. I found that Torimiro had subjected Curling to discriminatory treatment in employment on the basis of gender, as well as to both sexual harassment and sexual solicitation, and to retaliatory conduct when his sexual advances were rejected. Further, I held that Torimiro had violated Curling's right to claim the protection of the *Code*, without reprisal, by threatening and commencing legal action against her for pursuing her human rights complaint.

I held that Torimiro's conduct had infringed Curling's rights under s.5(1), s.7(2), s.7(3)(a) and (b) and s.8 of the *Human Rights Code*, R.S.O. 1990, c.H-19, ("*Code*"), in violation of the prohibition in s.9 of the *Code*. Further, I held Victoria Tea liable, under s.45(1) of the *Code* and at common law, for Torimiro's infringement of Curling's right to be free from sex discrimination, sexual harassment and sexual solicitation in employment, and from threats of reprisal for rejection of a sexual solicitation and for enforcement of her human rights.

I reserved on the liability of The Torimiro Corporation. This second corporation was not in existence at the time of the events giving rise to the initial complaint. The liability of The Torimiro Corporation had not been addressed in oral submissions and I gave all parties a further period of time to file written submissions on this point.

In addition, the Human Rights Commission ("Commission") had requested an opportunity to file further submissions on an aspect of the public interest remedies. I allowed written submissions from all parties on this issue, as well as on the liability of the Torimiro Corporation, for my consideration in the decision on remedy.

The respondents did not participate in the hearing after abandoning cross-examination of the complainant. However, after the period for further written submissions had expired, the Board received correspondence from a newly-retained solicitor representing the respondents, requesting an extension of time for filing submissions on all aspects of remedy. That request was treated as a motion, and all parties were given the opportunity to file written argument on whether the Board should accept submissions on remedy from the respondents at this late stage in the proceeding. The submissions which the respondents filed in support of their request for such an extension, also raised as an issue a reasonable apprehension of bias on the part of this Board.

On May 19, 2000, I released a decision dismissing the bias motion and allowing the respondents to file submissions on remedy, with the complainant and the Commission having a right of reply on or before June 15, 2000. Having reviewed the submissions of all parties, this is my decision on remedy.

REMEDIAL AUTHORITY

My authority to make a remedial order is established in s.41(1) of the *Code* as follows:

Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

Ontario human rights jurisprudence has articulated several categories or types of remedies which may be requested under s.41(1). Under subparagraph (a), the Board has, in previous decisions, ordered both personal remedies, such as promotion or reinstatement in employment, and public interest remedies, such as the establishment of workplace anti-discrimination policies. Under subparagraph (b), the Board has ordered monetary compensation for specific losses, such as lost earnings, as well as for less-readily quantifiable losses, including the loss of the right to freedom from discrimination. These two heads of restitutional damages are commonly referred to in the jurisprudence as "special damages" and "general damages" respectively, although these terms do not appear in the legislation.

In assessing a quantum for general losses, or "general damages" arising out of the infringement, the Board has, in many decisions, assessed an amount to compensate for the complainant's experience of discrimination, including such factors as humiliation, hurt feelings and loss of self-respect. Where the discriminatory conduct has affected the psychological well-being of the complainant, and has been wilful or reckless, the Board has exercised its discretion under s.41(1)(b) to make an additional award as compensation for the complainant's mental anguish, up to the statutory limit of \$10,000. The Divisional Court, in *York Condominium Corp. No. 216 v. Dudnik* (1991), 14 C.H.R.R. D/406, directed that any damages for emotional stress or suffering must be ordered as a mental anguish award, and not as "general damages".

In a previous decision, I have held that, where, as in this case, compensation is sought for the humiliation and loss of dignity associated with the experience of discrimination, the maximum amount recoverable for these losses cannot exceed the \$10,000 limit established under s.41(1)(b) for mental anguish awards:

In my view, there is an implied statutory limit of \$10,000 on that part of a monetary award which is ordered to compensate a complainant for the humiliation, loss of dignity and hurt feelings associated with his or her experience of discrimination. I have concluded that this is the only interpretation of s. 41(1)(b) that is consistent with Divisional Court decision in *Dudnik*. The Court held that the Board erred in ordering, as "general damages", an amount to compensate the

complainants for their emotional stress arising from the experience of discrimination. The Court concluded that emotional stress is only properly considered as a basis for a mental anguish award, where the infringement has been found to be wilful or reckless.....

Given that s.41(1)(b) provides that complainants can request an award of up to \$10,000, if and only if they have suffered mental anguish, and if and only if the infringement was wilful or reckless, it would be inconsistent if the section also allowed unlimited awards for the emotional impact of the discrimination that did not cause mental anguish and was not engaged in wilfully or recklessly. *Moffatt v. Kinark Child and Family Services*, [1999] O.H.R.B.I.D. No.15, para.31-32.

As was emphasized in the *Moffatt* decision, it is important not to minimize the significant humiliation, hurt and loss of dignity that may be suffered by a complainant, particularly in cases of repeated and public discriminatory conduct. In such cases, damages of \$10,000 have been ordered to compensate a complainant for the experience of victimization, including humiliation, in addition to compensation for mental anguish where the discrimination has been found to be wilful and reckless: *Naraine v. Ford Motor Company (No. 5)*, (1996) 28 C.H.R.R.D/267 at D/273-4 [upheld [1999] O.J. No. 2530 (Div. Ct.), leave to appeal on other grounds granted (C.A.); *Drummond v. Tempo Paint and Varnish Co.* (1999), 33 C.H.R.R. D/184 at D/189; *Moffatt v. Kinark Child and Family Services*, *supra*, para. 45.

To be clear, the scope of damages for general losses arising out of the infringement of rights is not, in my view, limited to damages for humiliation, insult to dignity or any other type of emotional impact not amounting to mental anguish. Human rights jurisprudence has long recognized that there is an intrinsic value to an infringed right, and compensation, in the form of "general damages", has been ordered for the loss of that valued right, in addition to an award for mental anguish: *Entrop v. Imperial Oil Ltd.* (1995), 23 C.H.R.R. D/213 at D/222, upheld [1998] O.J.No.422 (Div. Ct.), reversed in part on other grounds [2000] O.J. No. 2689 (C.A.). As well, there may well be other kinds of non-specific damages which could, in an appropriate case, be claimed under the wording of s.41(1)(b) as a loss arising out of the infringement.

However, where, as in this case, a complainant claims an award for loss of dignity and self-respect arising out of the infringement of their *Code* rights, apart from any claim for a mental anguish award, the maximum entitlement in respect of the former claim cannot, in my view, exceed the \$10,000 limit set by the statute for compensation for mental anguish.

STATUTORY INFRINGEMENTS

For ease of reference, I have included below the statutory provisions which the respondents were found to have infringed in the decision on the merits released December 22, 1999.

- 5.(1) **Employment.** - Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
- 7.(2) **Harassment because of sex in workplaces.** - Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- 7.(3) **Sexual solicitation by a person in position to confer benefit, etc.** - Every person has a right to be free from,
- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

8. **Reprisals.** - Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.
9. **Infringement prohibited.** - No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

REMEDIES SOUGHT

By the Commission

The monetary compensation sought by the Commission pursuant to s.41(1)(b) was broken down as follows:

- \$10,000 for the infringement of s.5(1), including the loss of dignity and self-respect experienced by Curling as a result of the discriminatory conditions of her employment;
- \$10,000 for the infringement of s.7(2), including the loss of dignity and self-respect associated with her experience of sexual harassment in the workplace;
- \$10,000 for the infringement of s.7(3)(a), including the loss of dignity and self-respect associated with her experienced of sexual solicitation in the workplace;
- \$10,000 for the infringement of s.8, including the loss of dignity and self-respect experienced by Curling as a result of the violation of her right to be free from reprisal;
- \$10,000 for the mental anguish suffered by Curling as a result of the willful and reckless infringement of her rights as an employee under s.5(1), s.7(2) and s.7(3)(a);
- \$10,000 for the mental anguish suffered by Curling as a result of the willful and reckless infringement of her right to be free from reprisal under s.8;
- \$2000 for the loss of income experienced by Curling following her resignation as an employee of Victoria Tea;
- an unspecified amount to cover the expenses incurred by Curling in retaining legal representation in respect of the retaliatory civil proceeding and in defending against "on-going reprisal at the Board of Inquiry";

- an unspecified amount for pre-judgment and post-judgment interest.

The Commission requested that I exercise my authority under s.41(1)(a), to direct the parties to achieve present and future compliance by making orders to:

- require the respondents to provide a copy of the decision on the merits to all current personnel and to all future employees at the point of hiring;
- permit the Commission to distribute the final decision to any present or future employees of the respondents or any future business entities owned or operated by the respondents;
- require the Commission to provide the final decisions herein to the offices of Human Resources Development Canada in the Greater Toronto Area;
- permit the Commission to make future periodic and unannounced visits to the premises of any business enterprise owned/operated by the respondents to distribute public education materials on the premises;
- permit the Commission, two years from the date of this order, to audit the personnel records of the respondents to ascertain the identity of current and former female employees for interview purposes;
- require the respondents to identify their current financial institutions on a semiannual basis;
- require the personal respondent to participate in an anti-harassment training program at his own expense within six months from the date of this order.

The Commission also asked that the Board remain seized of this matter for a period of two years to deal with any issues with respect to implementation of the Order.

By the Complainant

Counsel for the complainant submitted that Curling should receive a maximum “general damages” award of \$10,000 for each infringement of each statutory right. The complainant supported the Commission’s request for an award of \$20,000 for mental anguish. In addition, counsel argued that the respondent should be ordered to compensate the complainant for her costs in retaining independent counsel as follows:

- \$16,154.18, inclusive of GST, for legal expenses and disbursements incurred as a result of the discrimination and reprisal including:
 - i legal expenses incurred at the Board of \$7,000.00 and disbursements of \$601.00;
 - ii. legal expenses already incurred in responding to civil claim in the amount of \$2,000.00 and disbursements of \$496.36;
 - iii. anticipated expenses in the amount of \$5,000.00 to resolve the outstanding civil claim brought by Torimiro against Curling.

In addition, the complainant sought a series of remedies pursuant to s.41(1)(a). The Board was asked to order the personal respondent to:

- implement, at any present or future place of business, detailed workplace harassment and discrimination policies which articulate a commitment to an harassment-free workplace, a definition of behaviours constituting harassment, a process for making internal and external complaints and a workplace education program;
- provide all future employees with a copy of the policy of the Commission entitled *Sexual Harassment and Inappropriate Gender Related Comments and Conduct*;
- pay for and immediately attend counselling by a qualified counsellor with demonstrated expertise in sexual harassment and continue in such counselling until such time as the counsellor reports and certifies to the Board, and the Board is satisfied that, no further counselling is required;
- notify Human Resources Canada of the complete contents of the decisions against him in the present case and in *Hall v. Sonap* (1989), 10 C.H.R.R. D/6126, so that this information will be made available to any prospective employee;
- retain an independent external consultant with expertise in investigating and resolving sexual harassment complaints, to assist any future employee in making a human rights complaint, by conducting an immediate investigation and notifying the Commission;
- post the decisions and final order of the Board in any workplace owned, managed or operated by the respondents, including businesses operated indirectly through a partner or spouse.

Finally, counsel for the complainant also asked that the Board remain seized of this matter to deal with the implementation of the order, according to a set timetable, and to deal with any further acts of reprisal by Alexander Torimiro related to this complaint.

SUBMISSIONS OF THE RESPONDENTS

The written submissions filed on behalf of the respondents made representations on a number of issues as summarized below.

Quantum of Compensation

Counsel submitted that no monetary award was appropriate in this case for the reasons set out below.

- (1) The respondents have already suffered socially and financially as a result of "bad publicity" in the press following the release of the decision on the merits.
- (2) "Cultural differences" were a factor in Torimiro's conduct, arising from the fact that he is "originally from Cameroon and raised in a continental environment".
- (3) Compensation for lost earnings is not appropriate because Curling could have filed her complaint while remaining in her job at Victoria Tea; there was no finding that "the complainant's job was outright threatened"; and there was no evidence as to her mitigation efforts.
- (4) Some of the delay in the Commission's investigation of this complaint was caused by Curling herself, raising an issue "as to how serious was the harm to her and how serious was Torimiro's conduct".

Counsel submitted, in the alternative, that monetary compensation should be limited to a "general damages" award in the range of \$2000 to \$3000.

Legal Costs

Counsel submitted that the Board had no jurisdiction to award costs in respect of either the human rights proceeding or the civil action commenced by the respondents. With respect to the latter, counsel submitted that the Board would be "acting inappropriately as a s.96 court" if costs were ordered in relation to a matter before the courts.

Interest

Counsel submitted that the Board had no jurisdiction to award interest, relying on the decision of the Divisional Court in *Impact Interiors Inc. v. Ontario (Human Rights Commission)*(1995), 23 C.H.R.R. D/348. This decision has since been overturned: [1998] O.J. No. 2908 (C.A.).

MONETARY AWARD

My analysis of the complainant's entitlement to a monetary award is set out below with reference under the following headings: *Compensation for General Losses Arising out of the Infringement of Rights*; *Compensation of Mental Anguish*; *Compensation for Specific Losses Arising out of the Infringement of Rights*.

Compensation for General Losses Arising out of the Infringement of Rights

The complainant requested an award under this head of damages of \$10,000 in respect of each infringement, as "general damages" for the loss of dignity and self-respect associated with the infringement. I have found that the respondents infringed the complainant's rights under each of the following sections of the *Code*:

- s.5(1) (discriminatory conditions of employment based on sex);
- s.7(2) (sexual harassment);
- s.7(3)(a) (sexual solicitation);
- s.7(3)(b) (reprisal for rejection of sexual solicitations);
- s.8 (reprisal for claiming and enforcing rights under the *Code*)

I will begin by dealing with the complainant's entitlement to an award in respect of the first three infringements, and then consider her entitlement to compensation for the infringement of her right to be free from threats of reprisal under both s.7(3)(b) and s.8.

In Respect of the Infringement of Sections 5(1), 7(2) and 7(3)(a)

I am unable to agree that it would be appropriate to treat the violation of these statutory provisions as each supporting a separate maximum award for the loss of dignity and self-respect associated with the infringement. I have found, in my decision on the merits, that Curling endured a rapidly escalating pattern of conduct on the part of Torimiro: sexualized conversation quickly led to inappropriate touching and then to persistent sexual advances. Although I found that the initial sexual attention which Torimiro paid to Curling was itself a separate violation of the *Code*, infringing the s.5(1) right to equal treatment in employment, and that his subsequent conduct also violated both s.7(2) and s.7(3), in my view, compensation for the complainant's loss of dignity is, in this case, properly assessed as a single amount in respect of the full range of overlapping inappropriate sexual behaviour. This is not a situation in which the discriminatory conditions of employment are distinct from a co-existing pattern of harassment. The evidence indicated that the complainant experienced the inappropriate conversation, touching and solicitation as part of a continuous pattern of behaviour, and often experienced all three types of behaviour in a single day or a single encounter.

There would be a basis for separate awards, up to the maximum amount, for each infringed section (s.5(1), s.7(2) and s.7(3)(a)), if the infringing conduct in respect of each section was distinct, in substance or perhaps in timing, as opposed to the present case in which a continuing pattern of conduct infringes more than one statutory right. For example, two entitlements to "general damages" could arise if an infringement of s.5(1) is found based on gender-related differences in workplace policies which affect an employee who is also the victim of a contemporaneous incident or pattern of sexual harassment. In that situation, the employer could be ordered to compensate a female employee for the humiliation and loss of dignity associated with the discriminatory workplace policies, and also to compensate her for the humiliation and loss of dignity which she experienced as a victim of sexual harassment.

I also note that there are other kinds of circumstances in which a complainant might claim more than one "general damages" award in respect of offending conduct. An example would be if

the conduct complained of was discriminatory on the basis of more than one prohibited ground of discrimination (race and gender), or impacted on the complainant in more than one area of activity (in housing and in employment). These are not issues before me in the present case.¹

Turning to quantum, I find that Curling's evidence established that she was humiliated, both privately and in front of others, by Torimiro's sexualized conversation, his sexual touching, and his persistent sexual solicitations. Her evidence in this regard was corroborated by three credible witness: Yassini, Sulph and her sister, Deone Curling. It was apparent from Curling's testimony that Torimiro's behaviour completely undermined her confidence about her ability to manage herself in the workplace and in her dealings with the opposite sex. Her evidence indicated that this loss of confidence has continued to have an impact on her self-esteem as a young woman finding her place in the labour market.

The frequency of the inappropriate behaviour, occurring sometimes on a daily basis, makes this an appropriate case for a maximum award in this category. Accordingly, I find that the complainant is entitled to \$10,000 as compensation for the humiliation, loss of dignity and loss of confidence associated with her experience of sex discrimination, sexual harassment and sexual solicitation as an employee at Victoria Tea.

In Respect of the Infringement of Section 7(3)(b)

I have found that the personal respondent subjected the complainant to negative and punishing treatment as an employee after she took steps to avoid and curtail his sexual advances. The respondent's retaliatory conduct was separate and distinct from the conduct found to have infringed s.5(1), s.7(2) and s.7(3)(a), that is, the sexualized work environment, the harassment and the sexual solicitations. Accordingly, the complainant is entitled to a separate award as compensation for the infringement of her right, under s.7(3)(b), to be free from reprisals for rejecting the sexual advances of her employer.

¹ The question of overlapping entitlements was also considered in *Moffatt, supra*, under the heading "General Principles".

Curling's testimony indicated that, although the negative treatment was not as upsetting to her as the persistent sexual attention, she was insulted and humiliated by his abusive criticism of her in the presence of her coworkers. I find that an award of \$4000 is appropriate as compensation for the loss of dignity and self-respect associated with the infringement of the complainant's rights under s.7(3)(b).

In Respect of the Infringement of Section 8

I have found that Torimiro infringed s.8 of the *Code* by taking steps to punish Curling for continuing to pursue her human rights complaint before this Board. Most significantly, he commenced a civil action against her, claiming \$1.5 million for damage to his reputation caused by the allegations in the complaint.

Curling testified that she was upset and humiliated by the manner in which he served her with his Statement of Claim. She stated that he threw the court documents at her, in front of her witnesses and family, during a brief break in his cross-examination of her. She testified that she burst out crying in the hearing room right away, and upon reading the document, felt devastated and intimidated by the claim for such a large sum of money. She was also embarrassed by the fact that the Statement of Claim alleged, among other things, that she had behaved inappropriately in the workplace, pressuring her co-workers into supporting a fundraising event for her father, who was, and is, a member of the provincial legislature. Both Curling and Yassini testified that there was no truth to this allegation. Curling testified that she believed this was included in the Statement of Claim in order to embarrass her family, particularly her father, and to further pressure her to drop her complaint.

In finding that Torimiro took steps to punish Curling for pursuing her complaint, I also considered his letters to the Commission and her counsel, threatening to sue her witnesses and stating that he was "sending a direct warning to the commission (*sic*) and to all persons involved in this matter on behalf of the complainant". The letters to Curling's counsel and the Commission were extremely hostile and included racially-insulting comments about Commission counsel and a

demand that the complainant be withdrawn. Curling testified that the effect of all of these actions was to make her feel vulnerable, humiliated and helpless.

I find that an award of \$7000 is appropriate as compensation to the complainant for her experience in respect of the infringement of her right to claim the protection of the *Code* without reprisal. As discussed above, compensation in the nature of general damages has been awarded by this Board to recognize both the public humiliation that is often caused by discrimination and the value of the infringed right, in and of itself. In declining to award the maximum amount claimed, I rely on Curling's evidence indicating that the reprisal, in the form of legal action and threatened legal action, was not as publicly and repeatedly humiliating as the sexual harassment. However, the protection against reprisal in section 8 is an essential and fundamental component of the human rights enforcement regime in this province. An award of \$7000 recognizes the importance and value of the right which has been infringed.

Compensation for Mental Anguish

The Commission and the complainant requested two awards for mental anguish:

- \$10,000 in respect of the infringement of s.5(1) (sex discrimination), s.7(2) (sexual harassment) and s.7(3)(a) (sexual solicitation); and
- \$10,000 in respect of the infringement of s.8 (reprisal).

As discussed above, I have the authority under s.41(1)(b) of the *Code*, to award compensation for mental anguish, up to a maximum of \$10,000, if I conclude that "the infringement has been engaged in wilfully or recklessly". I will consider the two requested awards separately.

In Respect of the Sex Discrimination, Sexual Harassment and Sexual Solicitations

Dealing first of all with the infringement of the complainant's rights under s.5(1) and s.7(2) and (3), I find that Torimiro's conduct in respect of these violations was both wilful and reckless within the meaning of s.41(1)(b). In so concluding, I refer to the December 1999 decision in which I found that Curling, as well as Sulph, objected strongly to Torimiro's sexual solicitations in specific terms on several occasions. On more than one such occasion, Torimiro promised to

change his behaviour, but failed to do so. In these circumstances, there can be no doubt that Torimiro continued to make sexual advances with full knowledge that his behaviour was not only unwelcome to Curling but was viewed by her as amounting to sexual harassment.

Turning now to consider the evidence supporting an award for mental anguish, I note that the December 1999 decision summarizes Curling's testimony about the emotional impact of the discrimination, harassment and solicitation. Suffice it to say here that she experienced severe and mounting distress during her employment at Victoria Tea, and that the harassment and sexual advances seriously affected her physical and emotional health. Her discomfort was observed by several witnesses whom I have previously found to be credible: Sulph, Yassini and Deone Curling. She experienced nausea, headaches, sleeplessness, frequent crying and fearfulness. Eventually, she was unable to force herself to go to work.

The evidence of the expert witness, Dr. Welsh, summarized in the December 1999 decision, established that Curling's emotional and physical response to her situation at Victoria Tea was typical of many victims of sexual harassment. Curling testified that her experience at Victoria Tea has continued to affect the way she conducts herself and the kind of person she has become. She stated that, as a result of her experience, she has become a very reserved and "extremely private person", even with people close to her. She testified that she is uncomfortable with any kind of attention to her personal appearance, and that this affects the way she interacts with people and the way she dresses.

Curling also stated that her experience at Victoria Tea has had a continuing impact on her as an employee. She testified that she still tries to avoid being alone with a male supervisor and stays away from personal conversations with her colleagues. She testified that her career goal is to have a work situation with as much autonomy as possible because, in her words, she does not "trust as much in the employee-employer relationship". The evidence of Dr. Welsh was that an inability to feel comfortable with male supervisors and a lack of trust in employment relationships is not unusual for victims of sexual harassment. This impact of the harassment may have a long term effect on her prospects and opportunities in the labour market.

On the basis of this evidence, I find that an award of \$10,000 is appropriate to compensate the complainant for the mental anguish which she suffered as a result of the infringement of her right to be free from sex discrimination, sexual harassment and sexual solicitation. In making the maximum award, I have considered the vulnerability of the complainant as a young woman in her first full-time job, the frequency and intensity of the solicitations and the harassing conduct, as well as the evidence of a continuing impact on the complainant's emotional well-being which is exhibited both in her personal life and in her behaviour in the workplace.

In Respect of the Reprisal under Section 8

The first question to be considered is whether or not Torimiro acted recklessly or wilfully, within the meaning of s.41(1)(b), in taking retaliatory action against Curling for continuing to participate in the human rights hearing. The evidence established that Torimiro knew that Curling had found him intimidating when she was his employee. I conclude that Torimiro expected and intended that she would be intimidated by his letters to the Commission and her counsel, and particularly by service of the Statement of Claim on her during a break in his cross-examination of her. There can be no doubt, based on the contents of the Statement of Claim and the letters, that Torimiro intended to cause the complainant to fear reprisals, legal or otherwise, for having failed to abandon her human rights complaint. On this basis, I find that Torimiro breached the complainant's rights under s.8, both recklessly and wilfully.

Turning now to the impact of the retaliatory actions, I have already described how the threatening letters and service of the Statement of Claim had an immediate negative impact on Curling. Her testimony established that the commencement of the civil action, and the threats of further legal actions against her witnesses, had a continuing and escalating effect on her emotional health. She stated that she grew increasingly depressed and fearful, losing weight and sleep as the hearing continued, off and on, for a further six month period. She stated that she was afraid and "didn't know how far he would go" and that she "didn't see the point of continuing the hearing."

Curling's sister gave corroborating evidence about the effect of the threatening letters and the civil action on her sister's emotional state. Deone Curling stated that her sister became extremely depressed and distressed. She testified that, in the evenings after attending the hearing, Nicole Curling cried and screamed uncontrollably, and was afraid that she was not physically safe, and that her life was at risk.

On the basis of this evidence, I find that a maximum award of \$10,000 is appropriate to compensate the complainant for her mental anguish arising out of the infringement of her right under s.8 of the *Code* to be free from threats of reprisal.

Compensation for Specific Losses Arising out of the Infringement of Rights

The complainant claimed compensation for specific losses in two areas: lost earnings and the cost of retaining counsel. I am prepared to order compensation in both areas for the reasons discussed below.

Loss of Income

Subject to a duty to mitigate, a complainant is generally entitled to compensation for lost wages if he or she has left employment because of discrimination experienced in the workplace. However, in this case, respondent counsel has submitted that Curling should not be compensated for her lost wages because there was no need for her to quit her job while pursuing her human rights complaint and because she did not make adequate efforts to obtain a new position quickly.

I disagree. Curling was subjected to a course of conduct which included repeated unwanted and intimate sexual touching and the persistent pursuit of a sexual relationship. She was in a particularly vulnerable position at the time: she was hired by Torimiro to be his "right-hand person"; it was her first full-time job; she was 23 years of age; and she was expected to travel out of time with Torimiro. On one trip, Curling found herself staying in a private home with Torimiro and on that occasion he suggested that he would visit her room at night. On another occasion, she agreed, under pressure and false pretenses, to share a hotel room with him.

I have also found that Torimiro ignored Curling's pleas and demands that he change his behaviour. He also ignored the interventions of a mutual friend, Hyacinth Sulph. I accepted Curling's evidence that, in response to these objections and interventions, his behaviour alternated between continued harassment and abusive criticism.

Given Curling's age and circumstances, I do not find it surprising that she remained in the job as long as she did. However, the submission that she should be penalized for quitting is completely unsupported, and unsupportable, on the facts of this case.

Curling has claimed lost earnings for a period of only four weeks after she left Victoria Tea, in addition to the outstanding balance of an award of the Labour Relations Board for wages and vacation pay. She testified that she became re-employed after one month of unemployment. I award her the amount of \$2000 as compensation for her wage loss after taxes. I decline to make an order for the remainder of the Labour Relations Board award, as there are statutory remedies available for its enforcement.

Costs of Retaining Counsel

Counsel for the complainant requested compensation for the complainant's legal costs in respect of the human rights proceeding and, as well, in respect of the civil action commenced by the respondents against the complainant. Curling's testimony established that she had incurred legal costs of \$1,000 a day, plus disbursements, for approximately seven days of this hearing, when she was represented by her own counsel. She testified that, in addition, she had paid a \$2,000 retainer in respect of the civil action, plus disbursements, and anticipated further costs in that matter up to \$15,000.

Counsel for the Commission supported the claim for compensation for Curling's legal costs, arguing that her costs should be recoverable under s.41(1)(b), as a direct loss resulting from the reprisal.

Counsel for the respondents submitted that the Board's authority to order specific legal costs is limited, by s. 41(4) of the *Code*, to cases in which a complaint is dismissed and costs are sought as against the Commission. Section 41(4) states:

Where, upon dismissing a complaint, the board of inquiry finds that,

- (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
- (b) in the particular circumstances undue hardship was caused to the person complained against, the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

The only Ontario decision brought to my attention in which legal costs have been recovered by a complainant in a human rights proceedings is *Middleton v. 491465 Ontario Ltd.*(1993), 23 C.H.R.R. D/317 at 323. In that case, a respondent was ordered to reimburse a complainant for legal fees of \$476, incurred when her mortgage went into default as a result of the discriminatory termination of her employment.

Dealing first of all with the costs incurred by Curling in respect of the proceeding commenced in the Superior Court of Justice, I find that I am without authority to order the respondents to pay for her current or anticipated legal costs in respect of the civil action. I note that the complainant may be able to recover her costs in that forum at an appropriate time.

Further, I accept the submission that s.41(4) does not give me the authority to order specific legal costs in respect of the complainant's separate representation at the hearing before me. Rather, this section addresses a different situation: it gives the Board the authority to order the Commission to pay fixed legal costs to a respondent where the Board has found a dismissed complaint to be trivial, frivolous, vexatious, or brought in bad faith, or to have caused undue hardship to the respondent

However, in my view, this section does not foreclose the Board from ordering compensation, in an appropriate case, for a complainant's legal expenses, as part of a restitutional award under

s.41(1)(b). The Court of Appeal has stated, in *Airport Taxicab (Malton) v. Piazza* (1989), 10 C.H.R.R. D/6347 at D/6348, that the purpose of compensation under the *Code* is "to restore a complainant as far as is possible to the position that the complainant would have been in had the discriminatory act not occurred". Where, as in this case, a complainant incurs legal expenses which are directly caused by conduct of a respondent in violation of the complainant's rights under the *Code*, a respondent can, in an appropriate case, be ordered to pay compensation in respect of these expenses as part of a "make whole" remedy.

In this case, the complainant is claiming legal expenses incurred as a result of the retaliatory actions which have been found to infringe her rights under s. 8. It is significant that the retaliatory conduct took the form of legal action and threatened legal action, and necessitated a legal response. When Torimiro served Curling with the Statement of Claim for \$1.5 million, and tied that claim directly to alleged damage to his reputation arising out of her human rights complaint, then in mid-hearing before me, Curling acted reasonably in retaining separate counsel. Her need for independent legal advice became more pronounced when, shortly after service of the Statement of Claim, Torimiro wrote to the Executive Director at the Commission, threatening "a fight that will live in the annals of history" if the Commission did not withdraw the case. This letter was sent the same week as a letter to Curling's just-retained counsel in which Torimiro announced that he was going to serve "similar actions" on each of the witnesses still to testify in support of the complaint.

Given the pressure which Torimiro attempted to bring to bear on the Commission, Curling had every reason to take steps to ensure that her own legal position was being appropriately protected in the proceeding before me. The Commission represents the public interest in hearings before the Board, and brings forward evidence in support of the complaint as the party with statutory carriage. However, the Commission does not represent the complainant personally, and Commission counsel do not act as counsel for the complainant. Commission counsel would have ensured that the complainant understood this.

Although the Commission remained committed to carrying the complainant forward, the complainant acted reasonably in obtaining independent legal advice and representation in the human

rights hearing from the point at which she was served with the Statement of Claim. In any human rights hearing, the Commission and the complainant will have separate legal interests, but in this case, service of the Statement of Claim had the effect of creating potentially contrary legal interests as between the complainant and the Commission. Curling had reason to believe she needed her own counsel, not only to defend her in the civil action, but also to insure that the human rights proceeding was not being conducted in a way which would increase her vulnerability in the civil action and to insure that Torimiro's pressure tactics were not having a detrimental impact on her personal interests in the human rights proceeding.

Accordingly, I find that the complainant is entitled to a restitutional award, in the nature of special damages, as compensation for her reasonable legal expenses incurred as a direct result of the retaliatory legal action taken by the respondent. I find that an award of \$7,600 is appropriate to compensate Curling for the legal disbursements and counsel fees which she incurred in having separate legal representation for the last seven days of the human rights hearing.

NON-MONETARY REMEDIES

The statutory authority of the Board to order non-monetary remedies is remarkably broad. The Board may direct the party found to have infringed the *Code* to "do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices"[s.41(1)]. This authority must be interpreted liberally and applied in a manner which is consistent with the overall statutory purpose of the *Code* as remedial legislation.

In seeking a number of specific and stringent compliance measures, the Commission and the complainant have asked me to consider the fact that there is a previous decision of this Board finding that Torimiro sexually harassed a young female employee: *Hall v. Sonap*, *supra*. That decision accepted similar fact evidence that Torimiro had sexually harassed two other women, in addition to the complainant in that case, both of whom were his young employees. Allison Hall appeared as a witness before me; her evidence is summarized in the December 1999 decision. She testified that

she has continued to be affected by the harassment which she experienced as an employee of Torimiro and that the Commission has been unable to collect her damage award.

I have also been asked to have regard to the evidence of an employee hired after Curling, Sharon Hykoski, whose testimony is also summarized in my earlier decision. Hykoski testified that Torimiro talked to her about his "active sex life", about how attractive she was, and about how she should dress in skirts and dresses. She stated that he put his arm around her and, on one occasion, kissed her on the cheek. Hykoski testified that she was, and is, happily married and that she was able to ignore Torimiro's inappropriate conversation and conduct.

I agree that I should consider the findings in *Hall v. Sonap, supra*, and the evidence of a continuing pattern of harassing conduct, in fashioning the non-monetary component of the remedy in this case. Accordingly, the Order will include measures which are intended to require Torimiro to comply with the *Code* in his future conduct as an employer or supervisor and in respect of the future practices of any businesses which he owns or operates. If, as is argued by respondent counsel, Torimiro has now learned "what is appropriate and not appropriate", the measures ordered will allow him to demonstrate this change in understanding.

I have difficulty with two aspects of the remedy sought by counsel for the complainant. I am not prepared to require Torimiro to enter into, and continue in, personal counselling "until such time as the counsellor reports and certifies to the Board, and the Board is satisfied that, no further counselling is required". In my view, such an order would be unrealistic and impossible to enforce in practice. I am prepared to accept the Commission's submission that Torimiro should be required to attend a training program on how to deal appropriately with workplace sexual harassment.

For similar reasons, I am not prepared to order Torimiro to retain an external consultant to assist his future employees in making a human rights complaint.

LIABILITY OF THE TORIMIRO CORPORATION

The Commission and the complainant have submitted that the Torimiro Corporation should also be held liable for the violation of Curling's rights under s.5(1) (discriminatory work conditions), s.7(2)(sexual harassment), s.7(3)(a)(sexual solicitation), s.7(3)(b) (reprisal for rejection of solicitation) and s.8 (reprisal).

The Torimiro Corporation was added as a respondent to the complaint in September 1999. Although there was no evidence before me to establish conclusively the current legal status of the Victoria Tea Company, the Commission's motion to add the Torimiro Corporation as a respondent, relied in part on Torimiro's Statement of Claim in the civil action in which he stated that the Victoria Tea Company is now "a dissolved company".

Turning first of all to the violation of s.8, I find that the Torimiro Corporation is liable, under s.45(1), for the actions taken by Torimiro in 1999 which have been found to constitute reprisals against the complainant for enforcing her rights under the *Code*. I note that all of the letters which threatened legal action or urged the Commission to drop the complaint were sent by fax under the letterhead "The Torimiro Corporation". Because Torimiro held himself out to be acting as an agent of the Torimiro Corporation when he took retaliatory action against the complainant, the corporation appropriately shares liability for the infringement of the complainant's right to claim and enforce the protection afforded to her by the *Code*.

However, in my view, neither s.45(1) of the *Code* nor the "directing mind" theory of corporate liability, as developed in the human rights jurisprudence, (See *Wei Fu v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797 (Ont.Bd.Inq.); *Naraine v. Ford Motor Company Ltd.* (1996), 28 C.H.R.R. D/267 (Ont. Bd.Inq.), upheld *Ford Motor Company v. Ontario (Human Rights Commission)*, [1999] O.J. No.2530 (Div.Ct.)) provide a basis for holding the Torimiro Corporation liable for Torimiro's infringement of s.5(1), s.7(2), or s.7(3)(a) or (b). The reason is simple: the offending conduct took place in 1993; the Torimiro Corporation was not

incorporated until 1995. When Torimiro engaged in the offending conduct, he was not acting as an agent of the Torimiro Corporation, as would be required to establish liability under s.45(1); nor can he be considered part of the "directing mind" of the yet-to-be incorporated entity.

Nonethelēss, it is appropriate to hold a successor corporation liable for the discriminatory conduct of an agent of its predecessor corporation, where, as in this case, the agent is also closely associated with the second corporation, and the second corporation carries on the business of its predecessor. In a previous decision, the Board of Inquiry has held a corporation liable for harassment when it continued to operate the business of the corporation initially found to be vicariously liable, and continued to employ the manager responsible for the harassment: *Slobian v. Adam's Warehouse*, unreported decision, Ont.Bd. Inq. May 2, 1994. This decision relied upon a decision of the Ontario Court of Justice General Division: *Stone County Specialists v. Wiesco Canada Limited*, [1992] O.J. No. 2069, in which the Court attached liability to a successor corporation. In that decision, the Court stated:

The second company, under the continuing guidance of its sole shareholder, Peter Wiese, rose from the ashes of the first, to maintain an unbroken continuum of function ... the plaintiff should not be defeated by the device of creating a new company, under the continuing direction of the same mind as its predecessor, and continuing the same business, it was essentially simply a change of name.

A finding that the Torimiro Corporation shares liability with the other respondents would not offend the rationale applied by the Divisional Court in *Great Atlantic and Pacific Co. of Canada v. Ontario Human Rights Commission* (1993), 18 C.H.R.R. D/97 at 99; 13 O.R. (3d) 824. In that case, the Court reversed a decision of the Board of Inquiry to add, as a respondent, an unrelated successor corporation which had purchased the assets of the initial corporate respondent. The Court held that the successor corporation was a "complete stranger" to the complaint and complainant.

The Commission has argued that the Torimiro Corporation cannot be considered a "complete stranger" to the events in 1993 giving rise to this complaint. I agree. The personal respondent is the sole director listed for both corporations in the records of the Ministry of Consumer and Commercial Relations. Torimiro lists "Victoria Tea" and "The Victorian Iced Tea" as products on a business card under the name "The Torimiro Corporation". Further, there is evidence from two witnesses

indicating that the Torimiro Corporation continued the tea marketing business previously operated under the name of "The Victoria Tea Company". Hykoski testified that the Torimiro Corporation continued to operate the tea marketing business during her employment and after she was terminated in March 1998. The evidence of Abdul Yassini was that, as recently as the summer of 1999, he repaired tea packing machinery for Torimiro.

The personal respondent choose not to participate in the hearing or present any evidence. On the basis of the evidence before me, I find that the Torimiro Corporation has taken over operation of the business formerly run under the Victoria Tea name, and that, on this basis, the secondary liability of the Victoria Tea Company Limited should attach to the Torimiro Corporation.

ORDER

Alexander Torimiro and The Victoria Tea Company Limited and The Torimiro Corporation are ordered, jointly and severally, to pay to Nicole Curling the following amounts:

- (1) \$10,000 as compensation for her humiliation and loss of dignity resulting from the infringement of her rights under s.5(1), s.7(2) and s.7(3)(a) to be free from sex discrimination, sexual harassment and sexual solicitation;
- (2) \$10,000 as compensation for her mental anguish caused by the infringement of her rights under s.5(1), s.7(2) and s.7(3)(a);
- (3) \$4,000 as compensation for her humiliation and loss of dignity resulting from the infringement of her right under s.7(3)(b) to be free from retaliatory treatment for the rejection of sexual solicitations and advances;
- (4) \$7,000 as compensation for the loss of the right under s.8 to be free from reprisals for having filed and pursued a human rights complaint, and for the humiliation and loss of dignity associated with the infringement;
- (5) \$10,000 as compensation for her mental anguish caused by the infringement of her right under s.8 to be free from reprisals for having filed and pursued a human rights complaint;

- (6) \$2,000 as compensation for her loss of earnings after terminating her employment with the Victoria Tea Company Limited.
- (7) \$7,600 as compensation for her legal expenses arising out of the infringement of her right under s.8 to be free from reprisals;
- (8) prejudgment interest on all of the above at the applicable rate under the *Courts of Justice Act* April 15, 1994;
- (9) post judgment interest on all of the above at the applicable rate under the *Courts of Justice Act* from the date of this Order.

Further, Alexander Torimiro is ordered and directed to take the following actions to achieve compliance with the *Human Rights Code* in respect of his future conduct and the future practices of the corporate respondents and of any other current or future corporate entities or businesses which the personal respondent may own or operate, on his own or in conjunction with others:

- (10) implement, at any present or future place of business, a comprehensive workplace harassment and discrimination policy, approved by the Ontario Human Rights Commission, including a definition of harassing behaviours and an internal complaints process and specific notification that complaints arising under the policy can be taken to the Commission;
- (11) provide to all future employees, at any present or future place of business, a copy of the policy of the Commission entitled *Gender Harassment and Inappropriate Gender-Related Comments and Conduct*;
- (12) attend a training program, approved by the Commission, designed to assist employers and managers in identifying and addressing instances of sexual harassment and solicitation in the workplace;
- (13) provide a copy of the December 22, 2000 decision, and this decision, to any office of Human Resources Development Canada at which any of the respondents recruit or have recruited employees during a five year commencing January 1, 2000;
- (14) post a copy of this decision, forthwith and for a period of one year, in a place accessible to employees, at any current place of business owned or operated by any of the respondents;

- (15) provide the Commission with the names and addresses of any female employees who leave positions of employment with any of the respondents, for a period of five years commencing from January 1, 2000;
- (16) identify for the Commission, on a semiannual basis, the current financial institution used by each of the respondents.

The Board of Inquiry will remain seized of this matter for a period of 18 months from the date of this Order to deal with any issues with respect to implementation of the Order.

Dated at Toronto this 3rd day of October, 2000.

Katherine Laird
Vice Chair

